

SABAH BANK BHD

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v.

TAN SRI DATUK PANGLIMA WONG CHIK LIM

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
SULONG MATJERAIE J
[CIVIL SUIT NO: K22-33-1997]
23 MARCH 2005

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CIVIL PROCEDURE: Pleadings - Striking out - Claim by plaintiff against defendant as guarantor - Whether pleadings disclosed a reasonable cause of action - Whether a plain and obvious case for striking out - Rules of the High Court, O. 18 r. 19(1)(a)

c

LIMITATION: Striking out action on ground of time bar - Acknowledgment of debt - Whether results in a new period of limitation being computed from time of acknowledgment - Limitation Ordinance (Cap 72) (Sabah), s. 19(1)

d

CIVIL PROCEDURE: Striking out - Application for - Promptness of application - Interpretation of words "at any stage of the proceedings" in O. 18 r. 19(1) Rules of the High Court 1980 - Whether defendant filed application properly - Rules of the High Court 1980, O. 18 r. 19(1)

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WORDS & PHRASES: "at any stage of the proceedings" - Rules of the High Court 1980, O. 18 r. 19(1) - Scope of interpretation

This was an appeal by the defendant against the decision of the learned deputy registrar dismissing its application for an order that the plaintiff's statement of claim be wholly struck out under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('the RHC'). The plaintiff had brought a claim against the defendant under two letters of guarantee wherein the defendant jointly and severally guaranteed the repayment of all advances made to one Labuan Electronic Centre Sdn Bhd amounting to RM5,367,787.70 together with interest thereon. The defendant, besides averring that the statement of claim disclosed no reasonable cause of action, also contended that no demand on the defendant was pleaded in the pleading and that the present writ issued against the defendant in 1997 – 10 years after the cause of action arose in 1987 – was time-barred.

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a Held (dismissing the appeal):

- b** [1] It was important to scrutinize the guarantee signed by the defendant before making any decision in order to ascertain whether there were words in the guarantee document that required that the demand should be made first. Since this was an application under O. 18 r. 19(1)(a) of the RHC, no evidence was admissible, per O. 18 r. 19(2) of the RHC. As such, verification on such a critical issue could only be done at the full hearing of the matter. (p 128 e-f)
- c** [2] The defendant had failed to address the statement of reply made by the plaintiff dated 13 March 1998 that contended that the defendant had acknowledged the debt. Under s. 19(1) of the Limitation Ordinance (Cap 72)(Sabah), it was stipulated that an acknowledgment of liability made in writing results in a new period of limitation being computed from the time when the acknowledgment was so signed. It was also stated in the statement of reply that the defendant was fully aware of Labuan Electronic Centre Sdn Bhd's default and was actively involved in negotiating with the plaintiffs to settle the outstanding debt. The fact that the defendant had acknowledged the debt and was actively involved in the settlement negotiation suggested that the justice of the case required a full hearing rather than allowing an application under O. 18 r. 19(1)(a) of the RHC. (pp 129 g & 130 a-b)
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- f** [3] In instances where parties are negotiating a settlement, the words "at any stage of the proceedings" found in O. 18 r. 19(1) of the RHC may be interpreted to accommodate such a situation. However, even though an application under O. 18 r. 19(1)(a) of the RHC, in the circumstances, may be made after the action had been set down for trial as the parties were negotiating, it must be filed promptly when negotiations failed. When the defendant finally filed the summons in chambers on 6 September 2001, and with no explanation given, extending the term "at any stage of the proceedings" to such a time was no longer reasonable. Therefore, in the circumstances of this case, it was not proper for the defendant to file his application under O. 18 r. 19(1)(a) of the RHC when he did. (p 132 d-g)
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- h** [4] After hearing the submissions of both parties and upon perusal of the authorities and the established principles, it was clear that this was not a plain and obvious case for striking out the pleadings. (p 133 a)

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Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 (**fol**)

Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman & Another Action [1987] 2 MLJ 633 (**refd**)

Jamir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC (**refd**)

Marshall v. LPTB [1936] 3 All ER 83 (**refd**)

Mok Hin Wah & Ors v. United Malayan Banking Corporation Bhd [1987] 2 MLJ (**refd**)

Ng Kian Chong v. Saw Seng Kee [1994] 4 CLJ 857 HC (**refd**)

Nik Che Kok v. Public Bank Bhd [2001] 2 CLJ 157 CA (**refd**)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Bhd [1989] 3 MLJ 155 (**refd**)

Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305 (**fol**)

Tio Chee Hing & Ors v. Government of Sabah [1981] 1 MLJ 207 (**refd**)

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 (**refd**)

Legislation referred to:

Limitation Ordinance (Cap 72) (Sabah), s. 19(1)

Rules of the High Court 1980, O. 18 r. 19(1)(a), (2)

Other source(s) referred to:

Bullen Leake & Jacob's: Precedent on Pleadings, 12th edn, p 462

The Supreme Court Practice 1985, vol 1, p 304

Sulong Matjeraie J:

This is an appeal (encl. 64) by the defendant against the decision of the learned deputy registrar handed down on 16 May 2002 ordering that their application for an order that the plaintiffs' statement of claim be wholly struck out under O. 18 r. 19(1)(a) of the Rules of High Court 1980 (RHC) on the ground that the statement of claim discloses no reasonable cause of action be dismissed with costs.

JUDGMENT

a The brief facts of the case are that the then Sabah Bank Berhad, now known as Alliance Bank Berhad, is claiming against the defendant under two (2) Letters of Guarantee wherein the defendant jointly and severally guaranteed the repayment of all advances made to one Labuan Electronic Centre Sdn. Bhd. amounting to RM5,367,787.70 together with interest thereon.

b The defendant based their application on a number of issues though essentially they revolved around four major headings: firstly, the five paragraphs of the statement of claim in this action disclose no cause of action. Secondly, no demand on the defendant was pleaded in the pleading. Thirdly, the “joint and several” guarantee had merged with the judgment in suit No. K1261 of 1987 and lastly the claim was time barred. At this stage of the proceedings, I feel that it is imperative to deal with the issues raised, though not necessarily in the order they were presented by learned counsel for the appellant.

d On the issue that no demand on the defendant was ever pleaded, I am of the considered view that although in *Mok Hin Wah & Ors v. United Malayan Banking Corporation Bhd.* [1987] 2 MLJ the Supreme Court held that “Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor” I however feel that it would be a prudent to sight the guarantee signed by the defendant before making any decision. This is to ascertain whether, there are words in the guarantee document which requires that demand should be made first. Hence it is important to scrutinize the wordings in the impugned guarantee. As this is an application made under O. 18 r. 19(1)(a) RHC, no evidence shall be admissible, per O. 18 r. 19(2) RHC. As such I have no means to verify on this critical issue. This can only be done at the full hearing of the matter.

g The case of *Public Bank Bhd v. Chan Siok Lie & Ors* [1989] 2 MLJ 305 gave me considerable comfort when Shankar J (as he then was) said *inter alia* that: “There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a *sine quo non* to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases.” The learned judge cautioned that “great care should be taken when applying *Mok Hin Wah’s* case (for) it will only apply if the words of the guarantee specifically make a prior demand a condition precedent to suing the guarantor.” With respect, I agree with this statement of the law. Adapting the language found in the textbook *O’Donovan’s Modern Law of Guarantee* the learned Shankar J added that “there is no necessity for the creditor to make a demand upon the guarantor before enforcing the guarantee, unless the terms of the guarantee so required.” (@ p. 308 – H right). Even in the textbook

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Bullen Leake & Jacob's: Precedent on Pleadings, 12th edn @ p. 462 confirmed the proposition that "it is not essential to allege in the statement of claim that any notice was given to the surety that the principal debtor had made default or that upon such default any demand for payment had been made unless such notice has been expressly stipulated for." Therefore, I am unable to accept the contention of the learned counsel for the appellant that a demand must first be pleaded without the benefit of a proper scrutiny of the guarantee document.

In respect of the other Supreme Court case adduced by learned counsel for the appellant, ie, *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 155, all that I need to say is that what has been said in the previous paragraphs equally apply to this case as it was admitted by Lee Hun Hoe CJ (Borneo) (as he then was) at p. 156 thereof that "The facts in the instant case are almost on all fours with those of *Mok Hin Wah's* case ..."

I shall now deal with the issue of time-bar which the learned counsel for the appellant said "is not only relevant but also apparent"! It was contended that the present writ against the defendant was issued in 1997, ten years after the cause of action arose in 1987. The limitation period is either three years or six years. Three years for the recovery of debt, six years for breach of contract in writing. It was therefore argued that the writ issued in 1997 was time barred. Numerous cases were referred to, including *Nik Che Kok @ Nik Soo Kok v. Public Bank Berhad* [2001] 2 CLJ 157 (CA); *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207 (FC), *Marshall v. L.P.T.B* [1936] 3 All ER 83.

The unfortunate aspect of the argument of learned counsel for the appellant is that it failed to address the statement of reply made by the plaintiff dated 13 March 1998. The plaintiff contended that "On or about 20 December 1995 the defendant in a letter signed by him made an acknowledgment of the debt claimed herein to the plaintiffs." Now, under s. 19(1) of the Sabah Limitation Ordinance (Cap. 72) it stipulates that an acknowledgement of liability made in writing results in a new period of limitation being computed from the time when the acknowledgment was so signed. Further at para. 2 of the said statement of reply, it was stated that "the defendant has **at all material time fully aware of Labuan Electronic Centre Sdn. Bhd's default** and was **actively involved in negotiating with the plaintiffs to settle outstanding debt due and owing to the plaintiffs.** (emphasis added).

- a* The defendant was alleged to be an active party involved in the negotiation. Adjournment of the hearing had been allowed to accommodate the wishes of the parties as it was explained to me that the parties were exploring settlement. The fact that defendant has acknowledged the debt and he was actively involved in the settlement negotiation would, in my view, suggest that the
- b* justice of the case would require full hearing rather than allowing an application under O. 18 r. 19(1)(a) RHC. In any event, the principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) RHC are well settled.
- c* Lord Diplock in the Privy Council case of *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1 at p 1 said, “The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is drastic power. It should be exercised with the utmost caution.” The Privy Councillors before whom the matter was referred to comprised of Lord Diplock, Lord Cross of Chelsea, Lord Kilbrandon and Lord Salmon. Closer to home, the then Supreme Court comprising of Abdul Hamid Omar LP, Eusoff Chin and Mohamed Dzaiddin SCJJ (as they then were) availed themselves to the opportunity to consider the application of O. 18 r. 19 RHC in *Bandar Builder Sdn. Bhd. & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7.
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- e* Mohamed Dzaiddin SCJ (as he then was) delivering the judgment of the court said, and I quote the relevant paragraph at p. 11 *in toto*:
- f* The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it ‘obviously unsustainable’ (see *AG of Duchy of Lancaster v. L&N W Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that
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- h* the defences raised are not arguable.
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Further at p. 11 it was stated that:

This court as well as the court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and likewise, whether the defence to counterclaim raises a reasonable defence.

It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v. Lawson* and *Wenlock v. Moloney & Ors*).

Based on this statement of the law, I am therefore of the view that there exists a cause of action in this instant case.

Touching on the question of the submissions of both counsel on ‘joint and several guarantee’ had merged with the judgment in suit K1261 of 1987, I am more than convinced that this matter is no longer plain and obvious where it can be struck out under O. 18 r. 19(1) RHC.

Another matter that needs to be addressed is the question of promptness within which this application was made. This was addressed to by learned counsel for the plaintiff. The plaintiff filed the writ of summons on 25 March 1997 and served personally onto the defendant on 7 May 1997. Unconditional appearance was entered on 10 May 1997. The defence was filed on 20 May 1997. The statement of claim was amended on 20 November 1997 and an amended defence was filed on 26 February 1998. A reply to the defence dated 13 March 1998 was filed on 16 March 1998. Summons for Directions was heard on 26 June 1998. Notification of Setting Down Action and Request for Setting Down Action for Trial were both filed on 20 July 1999. Hearing was fixed for 10 to 11 May 2000. However, on 27 April 2000, the plaintiff wrote to this court requesting for two months adjournment to enable them to consider an out of court settlement. On 6 September 2001, the defendant filed this summons in chambers under O. 18 r. 19(1)(a) Rules of High Court.

Learned counsel for the plaintiff submitted that even though the rule states that the application for striking out an order can be made ‘at any stage of the proceedings’ it must be made promptly and before the close of pleadings. In *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman and Another Action* [1987] 2 MLJ 633 the learned Zakaria Yatim J (as he then was) said: “The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly

- a* and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial, see *The Supreme Court Practice* 1985, vol 1, p 304.” This decision was followed by Haidar J (as he then was) in *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773. It was further submitted that if there is any delay, an explanation for such delay should be rendered to the court, see *Ng Kian Chong v. Saw Seng Kee* [1994] 4 CLJ 857.

- c* It is to be observed here that although the application under O. 18 r. 19(1)(a) RHC was made after the action has been set down for trial, 14 days before the trial was to take place, the plaintiff wrote to the court praying for a two month adjournment as the parties were negotiating for an out of court settlement. The plaintiff’s letter was dated 27 April 2000. This request, which had the concurrence of the defendant, was acceded to. It could be seen from the Notes of Proceedings that this court was again notified on 8 August 2000
- d* by learned counsel for the plaintiff that the parties were exploring settlement and they needed another three months adjournment. I rule that where the parties are negotiating settlement, the words “at any stage of the proceedings” found in O. 18 r. 19(1) RHC may be interpreted to accommodate such a situation. In my view it would be premature and untenable for the parties to
- e* apply for such an order in the midst of their negotiations. As such, an application can still be made notwithstanding the action has been set down for trial with a caveat that the parties are still negotiating settlement. Based on the facts of this case, the application for further adjournment was made on 8 August 2000 requesting for three months adjournment as the defendant
- f* was alleged to be in Hong Kong. At the next date fixed for mention, ie, 18 June 2001, learned counsel for the defendant notified this court that they intend to file an application to strike out the writ. Although I am of the view that an application under O. 18 r. 19(1)(a) RHC in the circumstances, may be made after the action has been set down for trial as the parties were negotiating, I rule that it must be filed promptly when negotiations failed. When the
- g* defendant finally filed the summons in chambers on 6 September 2001 and with no explanation given, I feel that extending the term “at any stage of the proceedings” to such time is no longer reasonable. Therefore, in the circumstances of this case, I rule that it is not proper for the appellant to file their application under O. 18 r. 19(1)(a) RHC at the time when he did.
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After hearing the submissions of both counsel and upon perusal of the authorities and the established principles, I am of the considered view that this is not a plain and obvious case for striking out the pleadings on account that it discloses no reasonable cause of action. In the event, the appeal at encl. 64 is hereby dismissed with costs to be taxed. *a*

I further order that the summons in chambers filed by the plaintiff at encl. 75 to amend the statement of reply be heard expeditiously by the deputy registrar. *b*

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